CIRCUIT COURT OF HENRY COUNTY.

BURCHELL'S ADMR. v. NORFOLK & WESTERN RY. CO.

1. RAILROAD COMPANIES—*Duty to trespassers on tracks.* A railroad company owes no duty to a trespasser on its track, except to do all that can be done, consistently with its higher duty to others, to save him from the consequences of his own negligence after his peril has been discovered. *Humphreys* v. *R. R. Co.*, 100 Va. 749, followed. It does not owe him the duty of caution and vigilance until it has such notice or reason to believe that he may be in danger as would reasonably put a prudent man on the alert. *N. & W. Ry. Co.* v. *Wood*, 99 Va. 156, followed. But it is bound to use reasonable care to discover and not to injure persons, whether trespassers or licensees, whom it may reasonably expect to be on its track, which it knows has been for years and is still in constant and daily use as a walkway of a large number of persons in that vicinity. *Blankenship* v *C. & O. Ry. Co.*, 94 Va. 449 and *C. & O. Ry. Co.* v. *Rodgers*, 100 Va. 324, followed.
2. RAILROAD COMPANIES—*What trespasser must know affirmatively before recovery.* To entitle a trespasser, whether an infant or an adult, to recover against a railroad company for an injury inflicted upon its track, he must show, first, that the employees of the company actually saw him or that warnings or signals of danger proper to be heeded were brought to the attention of such employees, and, second, that after the trespasser was perceived or the signal apprehended, the company failed to do all that could be done and that was proper to be done to avoid inflicting the injury.

Hairston & Gravely and *N. E. Smith,* for plaintiff.

Henry G. Mullins and *J. Allen Watts,* for defendant.

Trespass on the case arising out of the alleged negligent killing of plaintiff's intestate. The facts appear in the opinion of the court. There was a verdict for plaintiff, and upon a motion to set the same aside, the following opinion was delivered by Hon. E. W. Saunders, Circuit Judge:

In addition to the record in this case, I have examined the record in the Lefew case, and the opinion of Judge Whittle, as well as the other authorities which have been cited.

The Burchell children were killed by a train of the defendant company at a point on its track some little distance to the south of Ridgeway in the county of Henry. The point of actual killing was within the limits of the town, which appear to be very extensive, in fact quite out of proportion to the number of its inhabitants. The country around the place of accident, which is on the top of a

fill, is rough and sparsely inhabited. For their own convenience these inhabitants and others used the track of the company as a walkway. This user which began to the south of the place of killing was chiefly exercised in going to and returning from the depot and different points within the town.

It is contended that this use of the company's property imposed an additional burden upon it at that point and charged it with the duty of foresight to trespassers, or at the best, quasi-licensees. The duty of a railroad to trespassers has been frequently stated in the Virginia reports, and the latest, and therefore the most authoritative, enunciation on this point is found in *Humphreys* v. *Valley R. R. Co.,* 100 Va. 749: "A railroad company owes no duty to a trespasser on its track, except to do all that can be done, consistently with its higher duty to others, to save him from the consequences of his own negligence after his peril has been discovered." It has been repeatedly stated that a railroad company ordinarily owes no duty of foresight to trespassers on its track, and the latest cases have emphasized this doctrine. Ordinarily, the only duty a railroad company owes to a trespasser on its premises, is to do him no wilful, or intentional, injury. It does not owe him the duty of caution and vigilance, until it has such notice, or reason to believe that he may be in danger, as would necessarily put a prudent man on the *alert*. *N. & W. R. R. Co.* v. *Wood,* 99 Va. 157.

In the argument of this case before the court on the motion to set aside the verdict, it was urged on behalf of the plaintiff that the Supreme Court in the *Dunnaway* case, 93 Va. 40, indicated a purpose to reverse its prior decisions, and establish a new principle as to trespassers. The language of the court, which is as follows: "The doctrine laid down by this court in *Joyner's* case and *Tucker's* case, is that when the danger of the trespasser is discovered, or by ordinary care and caution might have been discovered, it then becomes the duty of the railroad company to avoid the infliction of the injury without regard to the fact that the trespasser was himself guilty of contributory negligence, and that it must do all that can be done, consistently with its higher duty to others, to save him from the consequences of his own improper act"—furnishes colorable ground for this contention. This language had already been considered in another case in this circuit, and the conclusion reached that its use was probably inadvertent, since it does not correctly state the doctrine of the cases cited. It was further considered that

it was unlikely that the court in so brief and casual a manner would reverse a considerable line of apparently well considered cases. That this conclusion was correct was demonstrated by the latest utterances of the court in the *Humphreys* case, *supra.*

Taking the language of the court in the *Dunnaway* case, *supra,* in connection with its opinions in other cases, declaratory of the obligations of railroads towards trespassers, it is apparent that what it really meant to say in that case was, that after a railroad company has actually discovered a trespasser's danger, it must endeavor to preserve him from the consequences of his own negligence, or when such signals or evidences of danger as would indicate to a reasonably prudent man that there is trouble ahead are borne in upon the notice and observation of the company, or its engineer, or other responsible agent, it must use proper care and caution to discover persons likely to be on the track, even if trespassers, and avoid injury to them. See *Joyner's* case, 92 Va. 354. "The company cannot wilfully injure a trespasser, but its duty to protect him arises when it has notice, or reason to believe that he is in danger." (Judge Whittle's opinion in *Lefew's* case). The Supreme Court did not mean to say more than this in the *Dunnaway* case, or that case and the *Humphreys* case would be in obvious and palpable conflict.

There is, however, a well established exception to the rule, as to trespassers, and that is that a railroad company is bound to use reasonable care to discover, and not to injure persons (whether trespassers or licensees) whom it may reasonably expect to be on its track at a point which it knows has been for years, and is still in constant and daily use as a walkway of a large number of persons. From the cases to this effect, among the Virginia decisions. *Blankenship* v. *C. & O. Ry. Co.,* 94 Va. 449; *C. & O. Ry. Co.* v. *Rodgers,* 100 Va. 324, and *Lefew's* case, decided by Judge Whittle. will be selected for citation. Upon the facts in the two former cases, it appears that at the points of injury, the railroad company owed the duty of foresight to trespassers. In the latter case upon a review of the evidence, Judge Whittle denied the application of the doctrine.

It is from considerations grounded in a humane regard for the lives and limbs of an incautious public that a railroad company will not be allowed to run its trains on those portions of its track which with the knowledge of the company are in crowded use or

likely to be in a crowded use, without maintaining a vigilant look-out. But it must not be forgotten that the persons who indulge in this extensive use of the property of another for their own convenience, are the uninvited guests of the railroad company, and in the main are mere trespassers. By an unwarranted, abundant and persistent use of another's right of way, they impose additional obligations upon that other in the enjoyment of his property, and create a new right for themselves, namely the right of foresight from the company. This being so, the Supreme Court has not extended the doctrine, but applied it simply to those cases which in the main have arisen about the yards and tracks of railroads in and about towns and cities of some magnitude, where the unauthorized use of the tracks of the railroad is substantial and extensive, and where the daily users are numbered by the hundreds.

In the *Lefew* case, as in this case, the effort was made to show such a use of the track as imposed upon the company at the place of killing, the duty of foresight towards trespassers. Some of the witnesses testifying to the use of the railroad track in the *Lefew* case used language as strong as that used by the witnesses in the case in hand. On page 47 of the record in that case, the witness, John H. Davis, says, speaking of the use of the track: "It seems to be the custom and I see them passing there every day nearly, coming over that way." W. E. Franklin says: "They are walking along it all the time." Again, he says: "The are always travelling it—all the time," and in answer to a question by the court, he says: "They are most always travelling it." John R. Brown says: "There is a good many people that go to Bassett's and pass along there on the railroad, and then when people go up to Mr. Holcomb's store they usually come there before train time, and in going from Mr. Holcomb's store to the platform in winter time or muddy weather, they went across to the railroad almost in front of his store, and they would take the track and walk down to the platform." And again he says: "There is a pretty general passway up that way." And yet with this evidence before him, Judge Whittle used the following language in his opinion upon a demurrer to the evidence: "There is no evidence to support the contention of counsel that at the time of his death, plaintiff's intestate was a licensee on the track of the railroad company. The character of user necessary to create that relationship by implication has been defined by repeated decisions of the Supreme Court of Virginia. Some of the latest

are *Wilson's* case, 90 Va. 263; *Blankenship's* case, 94 Va. 449; *Bruce's Admr.,* 1st Vol. S. C. R. 333. If, under the evidence, it can be held that the company in any sense permitted or did not object to persons using its roadbed as a walkway, as was said in *B. & O. R. R. Co.* v. *Sherman,* 30 Gratt. 602, the permission was to do so at their own peril. It would be monstrous to hold that because people will persist in quitting the highways established throughout the country for their use and convenience to walk the tracks of railroad companies, whether in large or small number, they, by such conduct, which in the nature of things railroads cannot prevent, thereby become licensees, and entitled to the higher protection, with which the law invests that class. Such a doctrine would place tramps at a premium and offer a bonus to law breakers. It would be in a high degree wrongful and oppressive to railroads, and most detrimental to the public. Lefew was a trespasser from the time he first went upon the track of the defendant company until he met his death, and being a trespasser, the company did not owe him the duty of foresight. . . . . To sustain a recovery against the company under the circumstances of this case would amount to a confiscation of its property without warrant of either law or justice."

In the case at bar the use of the railroad track at the place of injury, and the number of people using it, are variously described by the witnesses. One witness, Mr. Moore, says that there are several houses in the neighborhood of the fill, and that he was accustomed to walk the track at that point and along towards the depot. He added that he had seen others do it frequently, and qualified this by saying that the use of it was "just occasionally a neighbor would walk up and down." This witness states that the population of Ridgeway is about 330 and that the main portion of the village is three-quarters of a mile from the fill and to the east of the depot. Another witness states that "a great deal of people pass there." Another says that it has been used as a foot-way ever since he knew the road. Still another, Mr. Burchell, says that "most everybody passes up and down all the time; it is a near way." Dr. Deshazo states that about 75 or 100 people to the south of the fill and about the same number to the north, use the track to the depot whenever they get ready; that a great many use it, but the witness is careful not to make an estimate in figures of the daily users. He

limits himself to saying that everybody who wants to go down there goes that way.

Now comparing this evidence of use with the evidence of use in those cases in which it was held that the railroad owed the duty of foresight to trespassers and quasi-licensees, it is evident that the case in hand falls as far short as the *Lefew* case of coming within that specially excepted class of cases, in which the continued and extensive use of the property of the corporation has imposed upon it the duty of foresight to trespassers. Conceding that in the sparsely settled neighborhood of the fill, to the north and south of the same, there are as many as 150 people, who, as occasion renders necessary, may use the track to the depot as a walkway, it is evident that but a small proportion of this number will actually walk on the track from day to day. There was no such use as is found in the suburbs of a populous city or the crowded yards of a great railroad.

The word "frequent" as applied to the use of a railroad in a sparsely settled community must be interpreted in the light of all the evidence relating to the number of people who have this potential use of the property of the railway as a walkway for their own purposes. The track of a railroad company has been described as a menace or warning of danger, and its use at the fill in question by the general public was at their peril. But whatever may be the view of the court as to what is actually established by the evidence in this case as to the character and extent of the use at the place of the killing, that evidence tends to show such a use as brings the case in hand within the principle of the *Blankenship* case, *supra*. This being so the trial court was constrained by the scintilla doctrine to give instructions based upon the plaintiff's view of the probative value of that evidence. The latest enunciation of the scintilla doctrine by our Supreme Court is in *Richmond Passenger & Power Co.* v. *Allen*, 43 S. E. 356: "In a plain case of total absence of evidence tending to make out the supposed case, the court may well refuse to give any instruction based upon it. But where there is such evidence, of however little weight it may appear to the court, or however inadequate in its opinion to make out the case supposed, it is best and safest for the court not to refuse to give the instructions asked for if it propounds the law correctly." This rule now spoken of as the scintilla doctrine has been approved in a great number of cases decided by this court, beginning with *Farish* v.

Reigle, 11 Gratt. 697. In *R. R. Co.* v. *Wilcox,* 99 Va. 394, Judge Buchanan says that whether or not evidence tending to prove the facts upon which an instruction is based is sufficient to support a verdict could not, under our practice, be passed upon by the court when instructing the jury. Where a defendant is of opinion that the plaintiff has failed to prove his case, he can demur to the evidence, and generally have the court to pass upon its sufficiency, or he can wait until the jury has found its verdict, and if it be against him, have the court pass upon its sufficiency upon a motion to set aside the verdict.

Being clearly of the opinion that the Burchell children at the time they met their death were not within the protection of the *Blankenship* case, but on the contrary were trespassers, and any recovery against the company based upon the theory that it owed them foresight and negligently failed to exercise it, is erroneous and must be set aside, it remains to be considered whether the evidence supports a verdict against the company upon the view that the children were merely trespassers.

A statement of the obligation of the company to a mere trespasser, renders clear the burden, in the matter of proof, upon a plaintiff trespasser seeking recovery for an injury. The duty of a railroad company is to protect a trespasser from the consequences of his negligence, after his peril is discovered, and to that end it must do all that can be done, consistently with its higher duty to others. However negligent a railroad may have been in failing to look out for a trespasser (if that can be called negligence which according to the decisions of the courts is merely the exercise of its right not to look ahead, if a trespasser only is involved), still in case of injury, this failure to look ahead does not afford a ground of recovery if the trespasser is never perceived, or if notice of the trespasser's danger, sufficient to put the railroad on the alert, is not borne in upon the attention of the agents of the company in charge of the conduct of the train. If such notice of danger is afforded (see *Joyner's* case, *supra*), or if the trespasser is discovered, and thereafter, certainly in the case of a child of tender years, if the company fails to do all that can be done, consistently with its higher duty to others, and, as a result of this failure, injures the trespasser, then it is liable. In the case of an adult trespasser, when the injury can be traced to the concurring negligence of the company, after the trespasser is discovered, and of the trespasser in

thereafter failing to do all that he can do to protect himself, the doctrine of contributory negligence would probably operate to relieve the company. But this doctrine is not applicable to the case in hand, for children of the tender age of the Burchell children are incapable of contributory negligence. (*Roanoke* v. *Shull,* 97 Va. 419).

It is incumbent upon a trespasser seeking recovery at the hands of a railway company for injury inflicted upon its track to show:

First. (a) That the company actually perceived him, not that it might have perceived him, not that opportunity to perceive him was afforded to the agents of the company, but that those agents actually did see him; (b) or that warnings or signals of danger proper to be heeded and of a character to put a prudent man on the alert were brought to the attention of the company's agents. (As to these signals or warnings of danger, see *Joyner's* case, *supra*).

Second: That after the trespasser was perceived or the warnings or signals of danger apprehended, the company failed to do all that could be done, and that was proper to be done, consistently with its higher duty to others to avoid inflicting injury upon him.

In the case in hand, there were no signals or warnings of danger. Hence the plaintiff must establish, not only that the engineer or fireman actually saw the children on or in immediate proximity to the track prior to the time at which efforts are shown to have been made to stop the train, but that they were seen for such a length of time prior thereto as afforded the agents of the company a sufficient interval within which to bring the train to a standstill, and avoid the injury, if prompt and immediate action had been taken. The burden is on the plaintiff to show that the children were seen in time to avoid the killing, and the evidence must show more than a mere probability that they were so seen. According to the evidence the children might or might not have been seen at such time. Conceding this, and that the evidence is equally consistent with either view, then the burden imposed on the plaintiff has not been successfully carried.

There must be affirmative and preponderating proof that the children were actually seen in time to avoid the injury by the use of proper precautions. The accounts of the actual circumstances of the killing are very different. The witnesses for the plaintiff put the children on the track about the time the station signal was blown, and if they had been seen at that time the injury could have

been avoided. The engineer and fireman say that when the first child was seen it was coming on the track. At this very moment, according to them, the danger signal was blown and the brakes applied. Now the only necessary conflict between these versions of the accident is as to when the children first got upon the track. The engineer may have been mistaken in his version of the matter, as he was approaching them on a rapidly moving train. Everything that occurred took place in a very short space of time, a few seconds at best, and the actors in this tragedy were no doubt excited by the peril of the children. The train was moving at a speed of twenty or thirty miles an hour, according to Lucas, and according to Ro. Anglin, it was running pretty fast, as fast as he ever saw it. At this rate of speed the distance from the road crossing to the place on the fill where the children were killed was traversed in about thirty seconds, while from the time the danger signal was blown until the same occurrence was only four or five seconds, six or eight at best. Everything, therefore, was over in the twinkling of an eye, and this must not be forgotten in appraising the value of the testimony of the witnesses who speak to the actual circumstances of the fatal injury. It is an easy computation from the known rate of speed to show that the witness Shropshire, who testified that when the danger signal blew the children were twenty or thirty yards ahead of the engine, and that after this alarm was sounded the child on the track did not run more than 60 or 70 yards before he was struck, was absolutely mistaken. And so as to the statements of other witnesses describing the occurrences of the killing. These witnesses were either in front of the approaching train or to the side. From either point of view it was difficult to locate with accuracy the relation of locality of the children to the approaching engine, and whether they were between or to the outside of the rails; also at what precise moment of time one or both got on the track in the way of the rapidly approaching peril, a peril so imminent and deadly that it was well calculated to disturb the balance of judgment of a spectator. Moreover these witnesses testify from their point of view, as was said by the Supreme Court of the plaintiff's witnesses in the *Humphreys* case, *supra,* and it by no means follows, again using the comment of the Supreme Court in that case, that what was apparent to them on the ground, was apparent to the engineer in his cab. According to the witness Donnelly, the children commenced to run when the danger signal blew.

At this time, according to Thacker, the children were 75 yards ahead of the train, but on this point he is not positive. According to Lucy Martin, when the danger signal blew, the train was right on the children. The witness, Shumate, says that a train at the rate of speed proved in this case could be stopped in something like 100 yards, more or less. It will hardly be contended that there is any liability upon the company, if the engineer did not see the children until the time at which he blew the danger signal. From that time on, every effort that could be made to stop the train and save life, was put forth. The account of the engineer and fireman is that prior to the accident they were looking ahead, how far ahead is not shown. Conceding that the children were on the track prior to the time that the station signal was sounded and that the engineer and fireman were there looking ahead, it does not follow that they saw the children prior to the time stated in their testimony. Their vision may not have been raised to an extent sufficient to see them, or they may have looked clear over the little objects until they were immediately upon them. The fireman states that as soon as he saw the children he looked across to the engineer and he was in the act of putting on the air. The engineer's account of the appearance of the children on the track differs from that of the plaintiff's witnesses, but he states most positively that as soon as he saw them, he put on his air, sounded his whistle and reversed his engine. It may well be that the children appeared so suddenly before the engineer, when they finally attracted his attention, that he was mistaken as to the time and manner of their approach to the track. But the main fact is that there is no preponderating evidence to show the precise moment at which he or the fireman first saw them. There is a possibility, but no more, that he and the fireman saw them sooner than the time fixed by their testimony. The circumstances, however, tend to confirm the engineer's evidence, that when he first saw the children he was about seventy yards from them. The witness, Anglin, states that when the danger signal was blown, the air was put on at once. Another witness for the plaintiff states, that at this time the children were about seventy yards ahead of the engine. Now the fireman says that when he saw the children, they were about 200 feet, that is about 66 yards ahead of the train, and at this very moment the engineer sounded his alarm and put on his air. He adds that as the engineer put on the air, he said: "I have done all that I can do." This exclamation

evidently came from the engineer's heart, and does not comport with the theory that he had seen the children in time to avoid killing them, and with cold blooded indifference, nay with diabolical heartlessness, rushed headlong upon them, delaying any efforts to warn them of danger or to stop his train, until with his experience as an engineer, he knew that any steps he might take would be unavailing. If he saw the children as soon as he might have seen them, according to the evidence, and recognized them as children, but delayed to sound his alarm or put on his air until he was immediately upon them, he was a murderer, a cold-blooded, deliberate murderer. This I cannot believe. Upon the whole the verdict was plainly wrong, possibly based upon the theory of the jury that the company owed the children the duty of foresight. The plaintiff's intestate in this case can recover as a trespasser only, and considering the testimony from that point of view, the plaintiff has failed to show by preponderating evidence that the defendant company saw the children in time to avoid killing them and thereafter failed to take the necessary and proper steps.

The plaintiff's evidence fails to do more than to show that the company's agent might have seen the children sooner than the time fixed by the engineer. Possibly he may have done so, possibly he did do so, but something more than this is necessary to support a recovery. He may have been mistaken or may not have told the truth, as to the time and circumstances of the appearance of the children on his track. Concede this, and what does it establish? Concede that his statements in this and other respects were false, and the burden on the plaintiff remains unchanged. It devolves upon the plaintiff to show that the children were seen in time to avoid injury, and to fix this time with reasonable precision. The evidence clearly shows that the children might have been seen in ample time to stop the train. At best this possibility is merely converted into a probability when the statements of the engineer and fireman are rejected as unworthy of belief. Upon that view of the case, to put the matter as strongly as possible for the plaintiff, it may be said that the engineer probably saw the children before he sounded his alarm, but if so how much before? A moment, a few moments, or how many moments? It is for the plaintiff to convert a probability into a reasonable certainty. It is for the plaintiff to fix with reasonable accuracy

when the company's agents actually saw the children, and to follow this up with evidence of negligence thereafter sufficient to cause the fatal injuries. The preponderating evidence, whether direct or circumstantial, sufficient to fix this time of initial sight is altogether lacking. Reject the evidence of the engineer and fireman entirely, and there still remains the evidence of the plaintiff's witnesses that a short while before the children were struck, the alarm was sounded and the brakes applied. Certainly they must have been seen at this time, and if an earlier date is contended for, it is not established by the evidence. It is not enough to say that they must have been seen, simply because they might have been seen. Physically speaking it was possible for them to have been seen for a distance between a quarter and a third of a mile, but were they so seen? The engineer and fireman may be perjured liars, and their testimony, not only where it conflicts with that of the plaintiff, but in all other respects, may be utterly unworthy of belief. Concede this and draw from this fact every reasonable deduction. In addition draw every reasonable deduction from the balance of the testimony, and the time when the children were first seen, if a date prior to the time of the signal alarm is assigned, is neither precisely nor approximately established.

It is considered that the verdict is not supported by the evidence, but is palpably erroneous, and the same will be set aside.

EDITORIAL NOTE.—We do not, as a rule, report cases which are pending and undetermined, but we deem the circumstances of the foregoing case and the application to them of the later Virginia decisions cited by Judge Saunders of sufficient general interest to the profession to justify an exception. We have seen a copy of the opinion of Judge Whittle, on circuit, in the case of *Lefew's Adm'r.* v. *N. & W. Ry. Co.*, but as the substance of it is given by Judge Saunders, and his quotations from it are literal, we do not reproduce it. The principal case presents another application of the scintilla doctrine, the intimation being made that, but for the doctrine, the instruction as to the probative value of certain of plaintiff's evidence would have been declined.

The case will doubtless reach the Court of Appeals, which will declare its judgment in due course. In the meantime and in this general connection, it will be of interest to learn that that Court on September 14, 1903, refused a writ of error to a judgment of the Circuit Court of Tazewell county in the case of *Newman's Admr.* v. *N. & W. Ry. Co.*, sustaining a demurrer to a declaration and dismissing an action brought upon the following state of facts:

Plaintiff's intestate was a boy twelve years of age, and while playing in a car loaded with coal, standing on one of the defendant's side tracks, was killed by a collision of a moving train with the loaded car, caused by the leaving open of

the switch to the side track. Among other things, the declaration alleged that *it had been the habit and custom of the children in the place where the accident occurred to get under, upon and in the cars of said defendant company placed upon side tracks at said place, relying upon the fact that such cars were upon the side track and that it was a place of safety;* that it was the duty of the defendant company to use ordinary care and caution to discover them and thus avoid their injury; that the servants of the defendant company negligently left open the switch to the side track; that the engineer of the moving train was paying so little attention to his business, and to any dangers that might be in front of his train, although he knew that men, women and children were daily and almost constantly upon the tracks at that point, and in, upon or about cars so situated, and although plaintiff's intestate could have readily been seen by him in ample time to have discovered the danger and stopped the train, that he never attempted to stop his train until he had gone a considerable distance upon the side track, when he discovered for the first time that he was upon the side track, upon which discovery he then did all he could to bring his train to a stop, but it was then too late, etc.

This is even a stronger case for the railroad company than the principal case, inasmuch as by the demurrer the alleged negligence as to the switch was admitted. Had the side track been disconnected, the accident could not have occurred. The judgment of the court, with which the appellate court refused to interfere, shows that notwithstanding this, the child was a trespasser, to whom the railroad owed no other duty than of *honest effort after actual knowledge.*